Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Improving Public Safety Communications in the 800 MHz Band	)	WT Docket 02-55
	)	
Consolidating the 800 and 900 MHz Industrial/Land Transportation and Business Pool Channels	)	
	)	
Amendment of Part 2 of the Commission's Rules To Allocate Spectrum Below 3 GHz for Mobile And Fixed Services to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Systems	)	ET Docket No. 00-258
	)	
Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for use by The Mobile Satellite Service	)	ET Docket No. 95-18

REPLY COMMENTS

I. OVERVIEW

Nextel continues to claim they are being treated unfairly, and that the minor (yet still inadequate) "concessions" the FCC has made to the benefit of non-Nextel licensees places Nextel in a position that is no longer "equitable" for them. Nextel asks the FCC to myopically focus on particular elements of the FCC orders that treat Nextel contrary to how Nextel wishes to be treated. In these areas, the FCC is endeavoring to address (but still falling short) the "equitable" treatment of non-Nextel

licensees, which (despite Nextel's refusal to recognize it) is one of the "paramount goals" in this proceeding, as established by the FCC.

Nextel knows they are getting a multi-billion dollar "windfall," yet it isn't enough, they want more. They continue to push the FCC to further improve their (Nextel's) position at the expense and further harm and detriment of non-Nextel licensees, with a "take-no-prisoners" attitude.

There can be no doubt that one of the most fundamental mandates to the FCC from Congress is that the FCC's decisions must be in the "public's interest." Indeed, in the "FCC Orders" (at issue here), the FCC defended many of their decisions that were challenged by numerous parties by claiming that their decisions were in the "public's interest."

The FCC Proceeding was initiated to address the communication signal interference between commercial wireless operators (primarily Nextel) and public safety communication systems in the 800 MHz band. The evidence in the record in the Proceeding supports any one of a number of "solutions" that the FCC could have selected as the basis for their decision as how to resolve the interference problem. Various options were available to the FCC since the interference problem was somewhat limited and its causes had been successfully addressed by applying what was known as "best practices." These "best practices" included, but were not limited to, tower height, antennae configuration, signal power, signal filtration, channel swaps and restrictions on usage of a limited number of particularly troublesome frequencies in problem-prone areas.

The available, supportable and workable alternative "solutions" included the following: (1) simply enforce existing regulations (47 C.F.R. Section 90.173(b) and 47 C.F.R. Section 90.403(e)), thereby requiring Nextel to correct the problems they were creating; application of "best practices" has proven to be successful; (2) application of "best practices" combined with limited "rebanding" of 800 MHz frequencies in only problem areas, thus excluding any exchange/private sale of the 1.9 GHz spectrum; or (3) application of "best practices" combined with nation-wide "rebanding" of 800 MHz frequencies, thus excluding any exchange/private sale of the 1.9 GHz spectrum.

During the Proceeding, a proposed solution known as the "Consensus Plan" was proffered by Nextel and certain other parties (including various public safety associations). This so-called "Consensus Plan" was a "megahertz-for-megahertz" exchange-based proposal, whereby Nextel would have "exchanged" a total of 10.5 MHz (4.0 in the 700 MHz band, 2.5 in the 800 MHz band and 4.0 in the 900 MHz band) for 10 MHz in the 1.9 GHz band; additionally, Nextel would pay for all rebanding costs. Numerous parties, including Verizon who filed an extensive economic study that concluded that the Consensus Plan would result in a $7.2 Billion "windfall" to Nextel, challenged the Consensus Plan. The FCC rejected the Consensus Plan and adopted a plan that was generally based on the Consensus Plan and in many ways, along the lines that Nextel had urged.

The FCC chose one of the most extreme "solutions" possible, as it called for not only nation-wide rebanding of the 800 MHz spectrum, but also Nextel's "exchange" of 4.5 MHz of 800 MHz spectrum (primarily non-contiguous frequencies of questionable

value) for 1.9 GHz spectrum (contiguous frequencies of tremendous value) and the assignment of an additional 5.5 MHz of 1.9 GHz spectrum to Nextel in what is tantamount to a "private sale" by the FCC to Nextel; additionally, Nextel would pay for all rebanding costs.

The FCC was in uncharted waters in the Proceeding. There was little or no precedent for many of their findings and decisions. This created a ripe situation for decisions that were arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law and that failed to consider relevant factors and reflect manifest errors in judgment and are not in the public's interest.

In the plan adopted by the FCC ("FCC Plan") in the FCC Orders, Nextel will receive a financial credit for (1) the net value of spectrum rights that Nextel is relinquishing to public safety, CII and other 800 MHz band licensees; (2) the actual cost of 800 MHz band reconfiguration (including both Nextel's costs to support relocation by other licensees and Nextel's own relocation costs); (3) costs incurred by Nextel to clear the 1.9 GHz band, less any reimbursed expenses. If these combined offsets ultimately total less than the value determined by the FCC for the 1.9 GHz spectrum rights, the FCC Orders require Nextel to make a payment to the U.S. Treasury at the conclusion of the transition process equal to the difference. The FCC concluded that requiring a payment from Nextel to maintain an exchange commensurate with the value of the spectrum it is receiving furthers the public interest objectives of the Communications Act and is consistent with the policy Congress articulated in Section 309(j) -- "of recover(ing) for the public of the portion of

the value of the public spectrum resource made available for commercial use and avoidance of unjust enrichment through the methods employed to award uses of that resource." The FCC's intent was to place Nextel in a comparable position to that which it occupied prior to the FCC Orders.

Given the various credits and offsets in the FCC's Plan, the valuation (i.e., determining a dollar value) of these individual components is absolutely necessary and exceedingly critical. The FCC was well aware of this, as they indicated they were sensitive to the arguments made by several parties that granting Nextel spectrum rights in the 1.9 GHz band could result in an undeserved "windfall" to Nextel. Furthermore, to ensure that Nextel was "treated equitably" but did not realize any windfall gain, the FCC provided for compensation of Nextel on a "value for value" basis. The FCC concluded that a "value for value" approach is the most appropriate for determining equitable compensation in this instance.

The FCC's decision to use a "value for value" approach was based on it not only being equitable to Nextel, but it would also be equitable for other licensees and the public. Indeed, one of the FCC's stated "paramount goals" was to find a solution that is both equitable and imposes minimum disruption to activities of all 800 MHz band users. Accordingly, the FCC conferred the 1.9 GHz spectrum rights to Nextel on a "value for value" basis to ensure that Nextel, other licensees and the public are treated equitably and that Nextel did not realize any windfall gain.

The FCC has clearly recognized and embraced the requisite distinction between "improving public safety communications" versus "improving Nextel." Indeed, this

distinction was clearly articulated by the FCC in paragraph 76 of the Report & Order by stating – *"While addressing public safety concerns is a priority of the highest order, it is in the public interest to do so in a way that does not result in a windfall for Nextel."* FCC Chairman Powell stated in his press release (dated July 8, 2004) upon the adoption of the FCC's Report & Order – *"In many ways, we have adopted a plan along the lines that Nextel has urged. We have not, however approved its plan outright because we always remain cognizant that our allegiance is only to the public good, not the private good."* Chairman Powell further stated in the aforementioned press release – *"We have taken prudent steps to try to protect the plan, always cognizant of the fact not to give away some of the most valuable spectrum we have for a song."*

Although the FCC's words and their clear intent and objective (based on equitable and public interest considerations) in the Proceeding and resulting orders, was to ensure Nextel did not receive any windfall, the FCC has failed miserably on this issue. The FCC has, in fact, based on evidence in the record, through manifest errors, given a multi-billion dollar windfall to Nextel, as addressed below. Additionally, other aspects of the FCC's Orders result in an improper treatment of non-Nextel licensees that truly is "inequitable." Specifically, the FCC has concocted what can only be described as a hodge-podge of different treatment (as addressed below) of 800 MHz licensees.

II. NEXTEL'S MULT- BILLION DOLLAR WINDFALL

Contrary to the FCC's objective to ensure Nextel did not receive any windfall, they gave Nextel a 2 to 3 Billion Dollar (or more) windfall. This windfall emanates from the manifest errors in the various calculations for the components of the "value for value" equation. Specifically, the FCC (A) undervalued the 10 MHz of 1.9 GHz given to Nextel by at least $1.5 Billion; (2) Overvalued the 800 MHz being relinquished by at least $1.3 Billion; and (3) provided for a combination of unsupported, unjustified credits that are nothing more than a "hocus-pocus" mechanism giving Nextel a further windfall of at least $650 Million. The aforementioned "windfall" numbers do not include an estimate of the additional "windfall" Nextel will reap via their exploiting of credits for capital expenditures to "maintain capacity." Nextel is going to claim an entitlement for capital expenditures to "maintain capacity" in its system. There has never been any data or estimate or proper clarification of what this means, thus it will likely be another way for Nextel to "backdoor" an increase to their "windfall".

Detailed calculations of the aforementioned "windfall" numbers were included in my "Opposition to Nextel's Petition for Reconsideration" (dated March 23, 2006) and in My "Petition for Reconsideration" (dated December 22, 2004).

III. IMPROPER TREATMENT OF LICENSEES

My interests are with Preferred Communication Systems, Inc. and its wholly owned subsidiaries (hereinafter referred to as "Preferred"). Preferred (a small business) holds numerous FCC licenses for 800MHz spectrum, with said licenses covering a population of 29 million. These are primarily geographical *Economic Area* ("EA") licenses acquired in FCC Auction # 34 for a combined gross bid of $49 million, with a net payment made (after small business credits) to the FCC of $32 million.

The treatment of Preferred in the FCC Orders is inequitable, discriminatory, anti-competitive and not in accordance with the stated objectives of the Proceeding. The FCC's treatment of Preferred is in violation of various provisions of the Communications Act of 1934, as amended, (these include, but are not limited to, Sections 257 and 309) and the Fifth Amendment of the U.S. Constitution. Under the FCC Orders, Preferred is being stripped of certain license rights (i.e. the right as an EA licensee to recover the "white-space" created when an underlying encumbering site-license is removed) and otherwise receiving detrimental treatment, at the same time, Nextel and other licensees are receiving expanded license rights and furthermore, **Nextel is the recipient of a multi-billion dollar "windfall"** as further described above.

In implementing Section 257 (which was added in 1996) of the Communications Act ("Act"), the Commission must *"promote the policies and purposes of this Act favoring diversity of media voices, vigorous economic competition, technological advancement, and promotion of the public interest, convenience and necessity."* 47

U.S.C. Section 257(b). Section 257 requires the Commission to adopt rules that identify and eliminate market entry barriers for entrepreneurs and small businesses in the *provision and ownership* of telecommunication and information services. Indeed, Section 257 embodies Congress' intent to facilitate opportunities for small businesses in telecommunications. This intent is also reflected in Section 309 of the Act (re: auctions), which requires the FCC to establish rules and other provisions to ensure small businesses have an opportunity to participate in the wireless industry and requires that the Commission promote economic opportunity and competition by disseminating licenses among a wide variety of applicants, including small businesses.

The improper treatment of Preferred is, in large part, a result of the FCC's varying treatment of EA licensees. With no regard to crafting a re-banding plan that was even remotely equitable, the FCC treated EA licenses at least a half dozen different ways. These variations include: **(1) Nextel Communications, Inc.** -- gets to exchange 4.5 MHz of less valuable, non-contiguous 800 MHz spectrum for 1.9 GHz spectrum, *and* gets to "purchase" an additional 5.5 MHz of 1.9 GHz spectrum at below fair value, *and* gets to exchange 6 MHz of less valuable, non-contiguous 800 MHz spectrum for contiguous 800 MHz spectrum, *and* is given the created "white-space" which legally belongs to other EA licensees, *and* gets expanded use of its 900 MHz spectrum, *and* receives various "unsupported / unsubstantiated / undeserved" credits totaling hundreds of millions of dollars. In total, in large part due to manifest errors by the FCC in their "value-for value" calculations, Nextel gets a "windfall" of at least 2 to 3 billion dollars, possibly more. The FCC made the clear determination in the

FCC's Orders that it was not equitable nor in the "public's interest" that Nextel get any "windfall." (2) Nextel Partners, Inc. -- gets to exchange less valuable, non-contiguous 800 MHz spectrum for contiguous 800 MHz spectrum. (3) Southern Company -- gets to exchange less valuable, non-contiguous 800 MHz spectrum (including a significant amount of B/ILT spectrum) for contiguous 800 MHz spectrum and gets expanded frequencies and coverage. (4) Non-Nextel EA Licensees who are in Operation – get to move to the cellular portion of the band on a one-for-one channel basis, thus recovering all of their underlying "white-space." They retain their right to operate a cellular system. (5) Non-Nextel EA Licensees who are not in Operation – get to move to the non-cellular portion of the band on a one-for-one channel basis, thus recovering all of their underlying "white-space." However, these licensees then loose their right to operate a cellular system. (6) Non-Nextel EA Licensees who are not in Operation – get to move to the cellular portion of the band, however, they only receive their pre-existing "white-space", since any newly created "white-space" is given to Nextel. Preferred is in this category.

In part, the FCC's improper treatment of Preferred stems from Preferred not being in operation in its licensed areas and the FCC's differential treatment of operating vs. non-operating licensees. The FCC created a *Catch-22* in clear violation of Sections 257 and 309 of the Act, since this proceeding placed Preferred's licenses in limbo, due to the uncertainties of their final status it could not commence operations; then, the FCC penalizes Preferred for not being in operation.

If Preferred had been in operation on November 22, 2004, its licenses would move to the cellular portion (ESMR) of the newly reconfigured 800 MHz band, on a one-for-one, encumbrance free basis for each of its total channels that it holds. However, since it wasn't in operation it has the option to move on a one-for-one, encumbrance free basis for each of its total channels that it holds, but only to the non-cellular portion; thus, it would be deprived if its right (previously acquired in the FCC Auction) to operate a cellular system. It could, however, move to the cellular potion of the band, but it would not receive any of the "white-space" created by the FCC Order's, since this is being given to Nextel. Instead, it would only get its "white space" that existed prior to the FCC Orders; thus, it would be deprived if its rights (previously acquired in the FCC Auction) to recovery of the so-called "white-space."

Two of the more glaring examples of the FCC's decisions being *"arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law"* are as follows: (1) the FCC altered its treatment of certain site-licensees noting that it (FCC) recognized that during the time the 800 MHz NPRM was pending, "sufficient uncertainty existed" about how licenses would incorporated into the overall band reconfiguration process, such that certain "business decisions" were "problematic." The FCC has given no such consideration to Preferred. (2) the operating vs. non-operating variable that applied to Preferred was not applied to Nextel and Nextel Partners, Inc. that , on a combined basis based on SEC filings (i.e., 10-K's and 10-Q's), were not operating in licensed areas covering approximately 30 million in population.

CONCLUSION

Nextel's claims of being treated unfairly should be summarily dismissed. Nextel is being compensated for "sharing" the new ESMR band by being given expanded 900 MHz operating rights, thus it is not entitled to any further compensation. The FCC should, as Nextel has requested, reconsider how Nextel has been treated under the "value for value" principle, and make the appropriate adjustments that eliminate the improper "windfall" Nextel is receiving. The FCC should reconsider its treatment of non-Nextel licensees, and revise it to an "equitable" situation, particularly for Preferred, as I have outlined in previous fillings in this proceeding. The FCC should reject Nextel's position that their agreement to the FCC plan makes any changes somehow improper.

Respectfully Submitted,

Charles D. Guskey
6237 Baymar Lane
Dallas, Texas 75252

Ph: (972) 250-1890

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